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No. 747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED AIRCRAFT CORPORATION (HAMILTON STANDARD DIVISION), *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF TO THE OPPOSITION BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

JOSEPH C. WELLS
WINTHROP A. JOHNS
1120 Tower Building
Washington 5, D. C.
Attorneys for Petitioner

Of Counsel:

REILLY AND WELLS
1120 Tower Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Contrary to the assertion of the Board in its Opposition brief (p. 6) that the petition raises "insubstantial" questions, the Opposition itself points up the importance of the substantial questions presented by the petition. The unqualified assertion in the Opposi-

tion (pp. 6-7) that "There are two methods under the Act by which the appropriate unit . . . may be determined"—either through the non-adversary representation procedures of Section 9 of the Act or through the partisan complaint procedures of Section 10 of the Act—regardless of whether the unit issue is raised in good faith and thus *bona fide* (Opp., p. 7), plainly emphasizes the importance of the questions raised.

It is clear from the Opposition that the Board currently believes, and intends henceforth to effectuate such belief, that a union, and perhaps an employer in isolated situations, has the right to have a *bona fide* dispute over the unit placement of employees resolved in a complaint proceeding under Section 10 rather than a representation proceeding under Section 9, notwithstanding this Court's decisions to the contrary cited in the petition (pp. 13-17) and the Board's prior contrary interpretation of the Act (see Pet., pp. 17-18).

The non-specific statements in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 266-267, cited in the Opposition (p. 7), plainly cannot be construed to override the prior specific holdings of the Court that unit issues must be resolved under Section 9, not Section 10 (Pet., pp. 13-17). The other case cited, *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, is inapposite. It merely recites that Section 8(a)(5) declares it to be an unfair labor practice for an employer to refuse to bargain with the employees' representative "subject to the provisions of Section 9(a)" and that Section 9(a) "says nothing as to how the employees' representative shall be chosen" (*ibid*, p. 71). But on the unit question, Section 9(a) specifies that the representative must be designated "in a

unit appropriate" for bargaining. As this Court has previously held (Pet., pp. 13-17), the only procedure for the determination of an appropriate unit is set forth in Section 9. Section 9(b) specifies that the Board "shall decide in each case . . . the unit appropriate for the purpose of collective bargaining" and in which a "labor organization shall be certified". Section 9(c) sets forth the procedures to secure certification.

The contention that the employer must invoke the procedures of Section 9—even if as in the instant case his good faith doubt as to the unit claim of the union is beyond question—or suffer the consequences of the procedures of Section 10 (Opp., pp. 6-7), is perversion of the Congressional purpose expressed in Section 9 to require the resolution of unit questions under the investigatory procedures of that section (see, Pet., pp. 14-15). It was incumbent upon the Union here, which was claiming that its certification as representatives of the production and maintenance workers covered the school trainees under the personnel department,[1] not upon petitioner, to invoke the procedures specified by Congress for the resolution of the question *it*

[1] The assertion in the Opposition (p. 9, fn. 5) that the trainees "both come from the regular work force and perform regular work of employees in the unit while still in the training program" is erroneous in both respects. As the Board itself stated in its recital of the facts (Opp. p. 4), applications for enrollment in the school from qualified persons who were not employees of petitioner, as well as from employees, were considered with preference given the latter. As to the assertion that the trainees "perform regular work", this is made in total disregard of the Trial Examiner's contrary finding that the trainees "perform no production operations" (J.A. 12, fn. 7). This finding was undisturbed by the Board (J.A. 2-4), and is controlling here.

raised.[2] Moreover, under the interpretation of the statutory scheme here advanced by the Board—of dual authority under Sections 9 and 10 to resolve *bona fide* questions regarding the unit placement of employees—which procedure prevails in the event an employer files a petition under Section 9 and a union files a charge under Section 10? Under the Board's interpretation of the Act it is clear that it, or its General Counsel, could disregard the employer's *bona fide* petition under Section 9 and proceed on the Union's charge under the complaint procedures of Section 10. The Board here claims (Opp., p. 1) that "representation questions may be determined by either of these routes".

The Board's representation that the issue here merely involves "the scope of a previously established bargaining unit" (Opp., p. 2) is inaccurate. The "previously established" unit was a "production and maintenance" unit. As pointed out in the petition (pp. 16-17), at no time during this litigation has the Board cited a single case in which trainees of the kind here involved have been held, over an employer's objection, to belong in such a unit. Moreover, the Board does not even contend at this late date that it has ever so found.

The claim (Opp., pp. 2, 8) that the "Board's conclusion that the machinists trainees were included in the production and maintenance unit covered by its prior certification is reasonable" has no foundation in fact. As pointed out in the petition (pp. 9-11), there

[2] The case cited in the Opposition (p. 7, fn. 3) in support of the Board's contrary position, *United Aircraft Corp., Pratt & Whitney Aircraft Division*, 124 NLRB 392, was initiated by petition of the Union *not the employer*.

was no such "conclusion" or finding predicated on facts in this case. Rather, the "conclusion" was predicated on the premise that it had been the Board's "general practice" to include similar trainees in such a unit, which premise we have shown was clearly erroneous (Pet., pp. 9-11, 16-17).

The assertion in the Opposition (p. 9, fn. 5) that petitioner's claim that the court of appeals "affirmed the Board's order on grounds different from those on which the Board relied" is without "substance" needs no reply. This is adequately covered in the petition (pp. 12-13). However, if the assertion were true the Opposition would have supported the claim that the Board's "conclusion" regarding the unit placement of the trainees "is reasonable" (*supra*) with citation to the Board's decision not with quotation of the findings of the court of appeals, as was done in the Opposition (p. 8).[3]

This case is not the situation of an employer refusing to bargain over wages and working conditions for employees clearly within the bargaining unit because he questions the inclusion therein of certain other employees. Here petitioner has accorded and continues to accord the Union full recognition as the representative of the production and maintenance employees. In the absence of any Board precedent that

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[3] One of these findings by the court below, quoted by the Board (Opp., p. 8), "that after 1941 no members of the bargaining unit attended the East Hartford training school" is contrary to the record and the Board's own statement of the facts in its Opposition (p. 3) that "Off and on since 1941, the Company has operated a training school at some distance from these plants, in Hartford, Connecticut, to which employees of both divisions were sent. Since the end of World War II, however, no Hamilton Standard employee has been sent to the school".

trainees like those in its newly created personnel department training school properly belong in a production and maintenance unit, and in view of the Company's long history of excluding similar trainees from such units, petitioner merely refused to accede to the Union's demand to represent this newly created group. Plainly Congress intended such a good faith doubt over the unit placement of employees to be resolved under Section 9, not Section 10.

There is a quick answer to the contention in the Opposition (pp. 7-8) that "no basis in the language or history of the Act, *or in reason*" (emphasis added), exists for treating differently a situation where the employer does not question the appropriate unit in good faith. In that kind of situation the Board reasonably may hold that there is no *bona fide* unit question requiring resolution under the procedures of Section 9, as it did in *Tom Thumb Stores,* 123 NLRB 833, cited in the Opposition (p. 7, fn. 4).[4] But when, as here, the unit question is raised in good faith—*i.e.,* poses a "real issue"—the sole statutory avenue for resolution of the issue is via Section 9.

WHEREFORE, it is respectfully submitted that the Board has failed to show reason why the petition for

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[4] Contrary to the content of this footnote in the Opposition, the cases there cited do support petitioner's position here. For example, in *Tom Thumb,* the Board found a refusal to bargain only because the employer's challenge to the unit, unlike here, did not pose a "real issue"—*i.e., bona fide* issue—requiring resolution in a representation proceeding. *United Butchers Abattoir, Inc.,* 123 NLRB 946, turned on the absence of a "bona fide doubt as to appropriateness of the unit" and the commission of "unfair labor practices" to "destroy the Union's majority" (*ibid.,* p. 957). *Orkin Exterminating Co.,* 136 NLRB 630, 631, 643, expressly recognizes that a good faith doubt as to the unit requires resolution under Section 9.

certiorari in this matter, challenging its disregard of statutory mandates and decisions of this Court in respect to important procedures under the Act, should not be granted. Accordingly, the petition should be granted to review the substantial and important questions raised.

Respectfully submitted,

JOSEPH C. WELLS
WINTHROP A. JOHNS
1120 Tower Building
Washington 5, D. C.
Attorneys for Petitioner

Of Counsel:

REILLY AND WELLS
1120 Tower Building
Washington 5, D. C.

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